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No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS IN SUPPORT OF CERTIORARI PURSUANT TO RULE 19.6

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BRIEF OF RESPONDENT NAPTS IN SUPPORT OF CERTIORARI PURSUANT TO RULE 19.6

INTRODUCTION

Respondent the National Association of Public Television Stations (NAPTS) submits this brief pursuant to Supreme Court Rule 19.6, in support of the joint petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.[1] NAPTS was an intervenor in the Court of Appeals on the same side as the petitioners in this Court.

NAPTS is a nonprofit membership organization established by the licensees of the nation's public television sta-

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[1]The decision below is now reported at 768 F.2d 1434.

tions. NAPTS coordinates the activities and represents the interests of public television station licensees before Congress, administrative agencies, and a variety of other forums.

NAPTS represents noncommercial, public television licensees who are dedicated to providing alternative high quality television services unavailable from the commercial television industry. This program service appeals to all segments of the population, but audiences for individual programs are smaller than for the mass-audience-appeal programming of our commercial counterparts. Sixty percent of the nation's public television stations operate on UHF channels, and it is those channels that are likely to be injured most by loss of cable carriage rights.

STATEMENT OF POSITION AND INTEREST OF NAPTS

NAPTS hereby incorporates by reference petitioners' Questions Presented, Statement of the Case, and the Reasons for Granting the Writ set out in the Joint Petition for Certiorari.[2]

The lower court's decision finds unconstitutional longstanding FCC regulations that foster two well established national policies: (1) the widest possible dissemination of

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[2]We note in addition that the lower court's expansive reading of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (*see* Petitioners' Appendix, pp. 37a-40a), seems particularly questionable in view of Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980), which explains *Tornillo* on the basis urged in the Joint Petition. *See* Pet., p. 9.

We also note that the Court presently has under submission another case in which a mandatory access or "must carry" requirement is being challenged as an abridgement of a claimed First Amendment right *not* to speak. Pacific Gas & Electric Co. v. PUC, No. 84-1044 (Argued Oct. 8, 1985).

noncommercial, educational television broadcasting service; and (2) increased development of UHF (Channels 14 and above) broadcast service. Both of these policies are designed to bring about increased diversity of locally-based television broadcast service as well as other benefits including expanded employment and ownership opportunities in the broadcast industry.

The Congress and the FCC repeatedly have indicated that the widest possible dissemination of public television service to all Americans is a fundamental national policy.[3] The government has channeled over 1.7 billion dollars through the Corporation for Public Broadcasting since passage of the Public Broadcasting Act of 1967 to fund and promote this service. The Commission has also explicitly recognized that the national policy of promoting public television is part of the basis for the must-carry requirements. In its earliest promulgation of the must-carry rules, the Commission affirmed that "established national policy . . . seeks to promote the widest reception of educational television service."[4] The must-carry rules promote this fundamental national objective by ensuring that cable systems carry local public television stations without regard to the size of

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[3]*See, e.g.*, Television Assignments (Sixth Report and Order), 41 F.C.C. 148, 158-164 (1952); All Channel Television Receiver Act, Pub. L. No. 87-529 (1962), 76 Stat. 150 (codified at 47 U.S.C. § 303(s) and § 330) and S.Rep. No. 1526, 87th Cong. 2d Sess. 2-3 (1962); Educational Broadcasting Facilities Act, Pub. L. No. 87-447 (1962), 76 Stat. 64 (codified at 47 U.S.C. § 390 *et seq.*); Public Broadcasting Act of 1967, Pub. L. No. 90-129 (1967), 81 Stat. 365 (codified at 47 U.S.C. § 390 *et seq.*).

[4]Rules re Microwave-served CATV (First Report and Order), 38 F.C.C. 683, 705, n. 34 (1965). *See also* CATV (Second Report and Order), 2 F.C.C.2d 725, 753, 761-62 (1966); United States v. Southwestern Cable Co., 392 U.S. 157, 174-75 (1968).

their audience and by enhancing the signal reception and coverage of public television stations.

Similarly, promotion of UHF broadcasting has been an established national communications policy for many years.[5] This policy serves the goals of diversity and localism, both of which contribute to a vital and diverse broadcasting industry as well as to the "maximum efficient utilization of the broadcasting spectrum space. . . . ."[6] The must-carry rules promote these two national objectives by ensuring that cable systems carry local public television stations without regard to the size of their audience and by enhancing the signal reception and coverage of public television stations. UHF signals are inferior to VHF in several ways: they require much higher power to cover the same area as VHF signals; their transmission costs are much higher; and they are more difficult to receive clearly, requiring outdoor antennas more often than VHF signals. Cable carriage renders UHF signals virtually indistinguishable from VHF signals, thereby eliminating the handicap UHF broadcasters labor under in competition with VHF stations.[7]

If the FCC had simply elected, as a matter of agency policy-making, to abandon these well established national policies and therefore to repeal the must-carry rules, such a decision would certainly have warranted the most careful

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[5]*See, e.g.*, All Channel Receiver Act, *supra;* S.Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962); H.Rep. No. 1559, 87th Cong. 2d Sess. 2-3 (1962); Report and Order, 21 F.C.C.2d 245, 247 (1970).

[6]S.Rep. No. 1526, *supra*, at 2.

[7]The Commission has explicitly found that UHF stations would be at a significant competitive disadvantage to VHF stations without the benefit of must-carry. *See, e.g.*, Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 713 (1979).

and searching judidical review. Here, where the lower court has adopted a novel interpretation of the First Amendment that requires at least a partial abandonment of these national policies, the desirability of a definitive ruling by this Court is increased. The desirability of such a ruling is underscored by the fact that three members of the FCC are apparently willing to accept the lower court's decision even though it requires a substantial retreat from the policies of fostering the development of public broadcasting and greater UHF development.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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OPPOSITION

BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT TURNER BROADCASTING SYSTEM, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of United States Court of Appeals for the District of Columbia Circuit holding that certain rules of the Federal Communications Commission mandating the carriage of television broadcast signals by cable systems were in violation of the First Amendment,

(a) where the court below invalidated only the rules in their current form;

(b) where the lower court's decision is founded upon a proper application of long-standing First Amendment principles and is consistent with prior decisions of this Court and other lower courts; and

(c) where the FCC has announced its willingness to consider proposals to recraft mandatory signal carriage rules in a manner intended to pass constitutional scrutiny?

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RESPONDENT TURNER BROADCASTING SYSTEM, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Turner Broadcasting System, Inc. ("TBS")[1] respectfully requests that this Court deny the petition for certiorari, filed September 23, 1985, seeking plenary review of a decision by the United States Court of Appeals for the District of Columbia Circuit vacating regulations (the "must carry" rules) established by the Fed-

[1] Pursuant to Supreme Court Rule 28.1, TBS states that it has no parent company or companies, and that all of its subsidiaries are wholly owned by TBS.

eral Communications Commission ("FCC" or "Commission") that required operators of cable television systems to carry, upon request, the signals of all television broadcast stations deemed "local" to the cable community.[2]

TBS initially petitioned the FCC to institute a rulemaking proceeding to delete these regulations in 1980, arguing that the rules abridged the constitutional rights of cable programmers by severely impeding, and often times completely barring, access to their intended audience, cable subscribers. Quincy Cable TV, Inc., the other respondent in this case, similarly challenged the constitutionality of the rules as applied to cable operators, since they impermissibly intruded upon the editorial discretion of cable operators in choosing those speakers, whether broadcast-originated or cable programmer, they wished to carry.

On July 19, 1985, a unanimous panel of the Court of Appeals ruled that the must-carry rules "are fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand." (Pet. App. 8a). The court limited its ruling to the must carry rules in their current form, and made clear that "[s]hould the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so." (Pet. App. at 60a).

On August 2, 1985, the FCC, the expert agency charged with protecting the public interest and a respondent below, decided not to challenge the decision of the court of appeals. (Pet. App. 137a). A majority of Commissioners, in fact, agreed that the decision "represents a positive step toward recognizing full First Amendment protection for all forms of electronic media." (Pet. App. 138a). Petitioners, a group including trade associations of television broadcast licensees and networks

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[2] 47 C.F.R. §§ 76.57, 76.59, 76.61, Pet. App. 133a-136a.

as well as a number of individual licensees and one such network, intervenors below, then sought a stay of the lower court's mandate. Their Motion for Stay of Issuance of the Mandate was denied by the court of appeals on September 3, 1985. On September 9, 1985, their Application to the Honorable Chief Justice, as Circuit Justice for the District of Columbia Circuit, for a Stay Pending Disposition of a Petition for Writ of Certiorari was also denied.

STATEMENT OF FACTS

TBS is a diversified corporation whose holdings include a broadcast television station, WTBS, Atlanta, Georgia, retransmitted by an intermediate carrier via satellite to several thousand cable systems nationwide, and two non-broadcast cable news services: Cable News Network ("CNN") and CNN Headline News.

CNN, CNN Headline News and WTBS are part of a recent phenomenon, cable programmers, made possible by the growth of the cable industry and the development of a satellite-based national cable programming distribution system. Today, this program industry includes approximately fifty national and regional programming services that provide entertainment and sports programming and specialize in such areas as news, financial, and other information services, coverage of congressional deliberations, and children's, health, religious and minority-oriented programming. This rich diversity in program offerings could not be achieved through scarcely allocated over-the-air broadcast stations.

For cable programmers like CNN, CNN Headline News and WTBS (outside of Atlanta) to reach their viewing audience, they must obtain access to a channel on a cable system. Cable systems can theoretically choose what to present to their audiences from among local broadcast television stations, signals of distant broadcast television stations, such as WTBS, locally-originated or

access programming, and non-broadcast programming specifically designed for cable audiences, such as CNN.

Cable television systems are limited by cost and technical restraints in the number of channels over which programming may be distributed to the public. Despite wide publicity given to a few recent urban cable systems operating 50-100 channels, nearly 20 percent of the cable systems in the United States have twelve or fewer available channels; an additional 32% have fewer than 30 channels.[3]

Until the decision of the lower court, cable programmers' access was further restricted, and in some cases foreclosed, by the FCC's "must carry" rules. These rules required a cable operator to retransmit all local broadcast signals with no compensation from the "local" broadcaster and without regard to the desires of cable viewers. Cable programmers had to compete for any cable system channel capacity left over.

Thus, the rules forced cable operators to carry one type of programming (local broadcast signals) in derogation of the rights of all other programmers and the interests of the public in the receipt of diverse services. Local broadcasters automatically obtained as many channels as needed, up to the full technical limits of the cable system.

The must carry rules also operated frequently to require a cable operator to carry more than one channel affiliated with the same network, thereby filling its limited channel capacity with duplicative programming, while depriving the public of access to other distinctive voices. In this government-imposed scheme, the preferences of viewers and listeners, whose rights are supposed to be paramount in any regulatory intrusion on broadcast First Amendment freedoms, were explicitly deemed

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[3] Television & Cable Factbook (1985 Ed.) at 1385.

irrelevant by the FCC in its enforcement of the must carry rules.[4]

The must-carry rules were originally adopted by the FCC in 1965, and applied to all cable systems the next year.[5] At the time, no cable programmers existed. The FCC articulated a two-fold rationale for the rules. First, the Commission believed that cable television was a "supplementary service" to, rather than a substitute for, off-the-air television service.[6] Because cable was nothing more than an "alternative way[] of making [broadcast] television programs available to the public," every local broadcaster was "entitled" to the protective treatment of the must carry rules.[7] Second, mandatory carriage was intended to prevent "unfair" competition between cable television and local broadcast stations for audiences they are licensed to serve. Otherwise, the Commission opined, viewers would lose access to "free" TV programming of local broadcast stations, since markets "fractionalized" by cable competition would lead to a loss of television viewers and a resulting fatal loss of advertising revenues for over-the-air broadcasters.[8] The

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[4] In an earlier stage of the instant case, the FCC explicitly stated that "[w]e have consistently found [viewer preference] insufficient to overcome the policies of our mandatory signal carriage rules." *Quincy Cable TV, Inc.*, 89 FCC 2d 1128, 1137 (1982).

[5] *First Report and Order in Docket No. 14895*, 38 FCC 683 (1965); *Second Report and Order in Docket No. 14895*, 2 FCC 2d 725 (1966).

[6] 38 FCC at 705.

[7] *Id.* at 713.

[8] *Id.* at 709-12. The FCC asserted jurisdiction over cable in part to preclude this possibility under 47 U.S.C. § 307(b), pursuant to which the FCC is charged to make an "equitable distribution" of stations to states and communities.

Contrary to petitioners' suggestion (Pet. 3), the Commission did not attempt to justify the must-carry rules on the grounds that cable operators could obtain and retransmit broadcast signals with-

Commission admitted that it did not have conclusive evidence that such a development would occur, yet it felt it did not need to wait "until the bodies pile up" before it acted.[9]

Over the succeeding 20 years, the FCC never reexamined these rules or attempted to ascertain whether they were necessary to maintain the economic vitality of local broadcasting. To the contrary, in 1971 and again in 1972, the Commission almost mechanically reaffirmed them.[10]

During the late 1970's however, the Commission for the first time began to examine rigorously some of the basic premises of its overall approach to cable regulation. In its review, the FCC found that its regulation of cable development had been premised on an "intuitive" model that cable competition would adversely affect local broadcast service that was without factual and legal support.[11]

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out negotiating copyright agreements or retransmission consent under Section 325 of the Communications Act (47 U.S.C. § 325). The Commission did attempt to offset these perceived advantages, but it did so by adopting other rules restricting cable operators' carriage of signals of distant broadcast signals. *See, e.g.*, 38 FCC at 705-06; 2 FCC 2d at 778-780. The Commission repealed those restrictions in 1980. *See* note 12, *infra.*

[9] 38 FCC at 701.

[10] *See Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115, 118-120 (1971); *Cable Television Report and Order*, 36 FCC 2d 143, 173, *recon.*, 36 FCC 2d 326 (1972).

[11] Its initial analsyis following three years of study was published in 1979. *Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC 2d 632 (1979) (*"Economic Inquiry Report"*).

Most pertinent, the Commission found that the competitive importation of distant signals by cable television did not so fragment the market for local broadcast stations as to threaten loss of over-the-air service to non-cable homes. *Id.* at 715. It concluded as well that cable should no longer be viewed merely as an auxiliary service

These findings led the Commission to subsequently eliminate the so-called distant signal carriage and syndicated exclusivity rules.[12]

The Commission thus repudiated the rationale upon which it had previously premised the must carry rules, that cable was "merely a supplement to broadcasting," and found there was no evidence to show that cable competition to broadcasters would be unfair. Yet, while the Commission acknowledged that the must carry regulations "may warrant review on [their] own merits," [13] because they were based upon the same intuitive assumptions now discredited by the FCC, it undertook no such comparable review.

The late 1970's saw a second important development that affects the constitutional status of the must carry rules—the emergence of national cable programmers. This new program industry developed partly in response to the 1976 FCC regulation changes,[14] the development of a domestic satellite distribution system, the deregulation

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supplemental to local broadcasting, but as a legitimate independent vehicle for providing alternative video services to the public. *Id.* at 645-46.

[12] *CATV Syndicated Program Exclusivity Rules (Report and Order in Docket Nos. 20988 and 21284)*, 79 FCC 2d 663 (1980). This Commission action was upheld on appeal by the Second Circuit. *Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1152 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[13] *Cable Television Syndicated Exclusivity Rules*, 71 FCC 2d 1004, 1006 (1979).

[14] In 1976, the FCC eliminated the so-called "anti-leapfrogging" rules, which had forced cable operators to grant priority of carriage to distant television stations located closest to a cable system in any given television market. Elimination of the leapfrogging requirement led to the development of "superstations" like WTBS, which could now be carried by cable systems nationwide through satellite distribution. *Report and Order in Docket No. 20487*, 57 FCC 2d 625 (1976).

of earth stations capable of receiving satellite broadcast signals, and the passage of the 1976 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, that included a compulsory license for cable retransmissions of broadcast signals.

Starting with the emergence of Home Box Office (a pay movie channel) in 1976, an entire industry of cable programmers arose, whose "rich variety" [15] of services are often tailored to specific audiences. None of these cable programmers existed when the must carry rules were imposed—all were adversely affected by them by having their access to their only channel of communication subordinated to all local broadcasters.

The absence of any rational basis for the rules in light of the cable industry's development and the emergence of cable programmers lay at the heart of the lower court's decision invalidating them. In two decades, cable had matured from an adjunct to broadcasting to a co-equal video service, selecting from among a variety of programming voices. Under those circumstances, the must carry regulations, which attempted to perpetuate an archaic relationship in which cable was subsidiary to broadcasters and failed to accommodate the rights of cable programmers, could not long stand.[16]

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[15] *In re Community Cable TV, Inc.*, 98 FCC 2d 1180 (1984).

[16] Thus, the court found that rules served only to "bolster the fortunes of local broadcasters" by giving broadcasters "an overwhelming competitive advantage over cable programmers" (Pet. App. 36a), offering indiscriminate protection to "each and every local broadcaster" regardless of the quantity of local programming actually available from that broadcaster and regardless of "whether or to what degree the affected cable system poses a threat to [that broadcaster's] economic well-being." (Pet. App. 54a-57a). The goal of preserving localism had become "undifferentiated protectionism" (Pet. App. 58a-59a), and the rules themselves were "insufficiently tailored to justify their substantial interference with First Amendment rights." (Pet. App. 60a).

SUMMARY OF ARGUMENT

Petitioners contend that the decision of the Court of Appeals represents a substantial departure in First Amendment law generally, and, more specifically, in the treatment of cable operators. They also assert that the lower court should have returned this case to the FCC before rendering judgment.

Petitioners' arguments do not bear scrutiny. In fact, the court of appeals broke no new First Amendment ground in concluding that the regulations at issue were an unjustified and grossly overinclusive attempt to implement particular goals of communications policy. The court found that those regulations impermissibly favored some speakers over others, in violation of this Court's long-standing principles. In reaching this conclusion, the court correctly applied the most lenient standard of review reserved for incidental restrictions on speech as established in *United States v. O'Brien*.[17] The court was also careful to balance its deference to agency expertise with a legitimate concern for First Amendment freedoms.

Contrary to petitioners' suggestions, this Court has never sanctioned the constitutionality of the must carry rules. While a single court of appeals' decision almost 20 years ago did uphold those rules against a First Amendment challenge, that decision was based on an asserted governmental interest, *i.e.*, spectrum scarcity, that the FCC has acknowledged does not apply to the must carry rules. Recent decisions in other circuits in fact reflect a recognition that the First Amendment limits government regulation of cable operators and programmers.

The court below did not attempt to extend the reach of its opinion beyond the must carry rules in their current form. In fact, the court invited the FCC to attempt to recraft the rules in a manner consistent with the First

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[17] 391 U.S. 367 (1968).

Amendment, and the FCC has expressed its willingness to attempt to do so. In response, a number of the petitioners have requested that the Commission commence a proceeding intended to revise the rules.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSTITUTIONALLY CORRECT AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER LOWER FEDERAL COURTS.

Petitioners argue for review on the grounds that the lower court's decision raises novel constitutional issues (Pet. 8-12), and is inconsistent with prior decisions of this Court and other lower courts involving cable issues. (Pet. 12-15). Neither argument bears close scrutiny.

A. The court of appeals broke no new First Amendment ground in reaching its conclusion that the must-carry rules are fundamentally at odds with the Constitution. To the contrary, the court recognized that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them" (Pet. App. 29a), based chiefly upon this Court's recognition that the First Amendment tolerates far more intrusive regulation of broadcasters because of "the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum," *i.e.*, the scarcity rationale. *Id.* at 29, *citing FCC v. League of Women Voters of California*, —— U.S. ——, 104 S. Ct. 3106, 3116 (1984); Pet. App. 31a-32a.

As the FCC itself indicated to the court below, however, the must carry regulations are not based upon the scarcity rationale that provides the constitutional underpinnings for broadcast regulation.[18] *FCC Brief, Quincy*

[18] Petitioners' suggestion (Pet. 23) that it was the court of appeals that decided that the scarcity rationale was inapplicable is entirely specious.

Cable, D.C. Cir. No. 83-1283 at 19-23 (filed July 15, 1983). In the absence of that rationale, regulations restricting the First Amendment rights of cable operators are subject to a stricter standard of review than, say, the rules requiring balanced coverage of controversial public issues on radio and television stations. Thus, the court properly recognized that the must carry rules work "substantial limitations . . . on the [cable] operator's otherwise broad discretion to select the programming it offers to subscribers." (Pet. App. 37a.) This is far from an incidental intrusion, since "[o]nce outside the special constitutional realm reserved for privileged occupants of the physically scarce airwaves, the First Amendment guards against governmental intrusions into the editorial function even more jealously. *Compare Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. 367 [with *Miami Herald Publishing Co. v. Tornillo*]". (Pet. App. 39a).

Equally important, but virtually ignored by petitioners (Pet. 8 n.10), the court also found that the rules impermissibly interfered with the rights of *cable programmers*, such as Cable News Network, Black Entertainment Television, and The Disney Channel, since they are "explicitly designed to 'favor[] certain classes of speakers over others'" and "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers." (Pet. App. 36a) (citations omitted). This result conflicts with this Court's oft-stated principle that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*); Pet. App. 37a. And, most importantly, the court found that these rules consciously ignore public preference, and therefore clash irreconcilably with this Court's basic principle that the interests of viewers should

be considered "paramount" in the First Amendment calculus. (Pet. App. 41a) (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

B. Petitioners attempt to concoct conflicts between the instant opinion and the decisions of other courts of appeals and prior Supreme Court opinions. However, these supposed "conflicts" were considered and persuasively answered by the court of appeals, and upon analysis, simply do not exist.

The fact is that this Court has never upheld the constitutionality of the must carry rules, but instead has specifically disclaimed reaching any First Amendment issues with respect to cable when those issues have been presented to it. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979); *Capital Cities Cable, Inc. v. Crisp*, —— U.S. ——, 104 S. Ct. 2694, 2701 n.6 (1984); Pet. App. 19a, 22a. While this Court may have spoken to the FCC's *jurisdiction* to promulgate rules in general, it has not addressed the *constitutionality* of the particular rules adopted. *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157, 167 (1968).[19] Indeed, to the extent the Court has addressed the constitutional rights of cable operators at all, it has determined that this issue was "not frivolous." [20]

In order to bolster their argument that the court of appeals decision "conflicts" with other courts' decisions in the cable area, petitioners invoke *Black Hills Video Corp. v. FCC*, 339 F.2d 65 (8th Cir. 1968). Notwithstanding petitioners' suggestion that lower courts require

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[19] In *Southwestern Cable*, this Court "emphasize[d] that questions as to the validity of the specific rules promulgated by the Commission are not now before the Court." 392 U.S. at 168. Contrary to petitioners' assertions (Pet. 20), *Southwestern Cable* did not hold the must carry rules to be within the constitutional authority of the agency.

[20] *FCC v. Midwest Video Corp.*, 440 U.S. at 709 n.19.

"guidance" as to the continued vitality of *Black Hills Video* in light of lower court opinion here (Pet. 15), that decision has long been discredited by not only the Court of Appeals for the District of Columbia Circuit,[21] but by virtually every other circuit (including the Eighth Circuit itself) that has subsequently considered the First Amendment status of cable television.[22]

Moreover, *Black Hills Video* was premised on the theory that the must carry rules were justifiable by the FCC on a scarcity grounds—a rationale upon which the Commission does *not* rely in this case. Thus, *Black Hills Video* provides no comfort for petitioners in their search for a conflict to justify Supreme Court review.

If anything, the lower court's opinion is remarkably *consistent* with past precedent. In the 1977 *Home Box*

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[21] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 n.80 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[22] The Eighth Circuit in *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), implicitly rejected its earlier reasoning in *Black Hills Video* by recognizing that cable operators exercise a significant amount of editorial discretion protected under the First Amendment, and that cable-originated services have First Amendment rights that cannot be denied merely by speculating about the impact of cable television on broadcasters. The *Midwest Video* court referred to *Black Hills Video* as merely a case dealing with the FCC's authority to regulate "with respect to the technicalities involved in cable systems' use of *microwaves*. . . ." *Id.* at 1054 n.71.

In *Preferred Communications, Inc. v. City of Los Angeles*, the Ninth Circuit explicitly repudiated *Black Hills Video*, explaining

> [t]hat case involved the FCC's efforts to regulate an early community antenna system that merely retransmitted signals received from broadcasting stations; cable technology . . . has evolved significantly since the time of *Black Hills Video*. . . . More recent cases have expressly concluded that the physical scarcity rationale does not apply to cable. . . . *Black Hills Video*, therefore, is a doubtful precedent today.

754 F.2d 1396, 1404 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985).

Office[23] case, for instance, FCC cable regulations that protected broadcasters were found constitutionally infirm. Like the must carry rules, the pay cable rules at issue there protected broadcasters from the marketplace at the expense of cable operators and viewers. The pay cable rules were similarly based upon Commission intuition and the purported need to protect broadcasters against allegedly ruinous competition. Upon analysis, the pay cable rules could not be justified upon either constitutional or policy grounds. Therefore, the court of appeals overturned the FCC's detailed regulatory scheme for pay cable, which had been in place for many years.

Finally, this Court has never sanctioned the infringement of the constitutional rights of cable programmers such as TBS by government regulation. Nor has this Court ever validated a scheme that elevates the rights of some speakers, broadcasters, over the rights of other speakers, cable programmers. Accordingly, in finding that these rules impermissibly "bolster[ed] the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers,"[24] the court correctly applied the First Amendment teachings of this Court,[25] and petitioners do not even attempt to argue to the contrary.

C. In fact, it is petitioners who urge a result that would be totally alien to First Amendment jurisprudence. Petitioners argue that the rules only *appear* to restrict speech; in reality, "[a]ny immediate shortage of channels results not so much from the must carry rules as from the cable operators' lack of foresight as to optimal channel capacity, or perhaps a reluctance immediately to invest in greater channel capacity." (Pet. 9). In

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[23] *Home Box Office v. FCC, supra.*

[24] Pet. App. 36a.

[25] *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

effect, a cable operator's right to exercise editorial discretion to select from among the available sources of programming would be dependent upon the operator's willingness or ability to incur the substantial costs of increasing its channel capacity—all so that local broadcasters would be guaranteed access to the cable system.[26] However, this Court long ago rejected such "right-to-access" schemes as impermissible intrusions on First Amendment discretion.[27]

Petitioners also attempt to justify a lesser First Amendment protection where must carry is concerned by suggesting that cable operators are communications common carriers acting "merely [as] . . . conduit[s]," at least insofar as the transmission of broadcast signals is at issue. (Pet. 10). In their role as carriers, petitioners argue, cable operators are not entitled to full First Amendment rights. Petitioners' argument is baseless. As this Court has stated, "[t]he Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters."[28] Petitioners have provided no grounds for

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[26] By contrast, telephone companies need not construct additional facilities to meet demand if their existing capacity is exhausted, *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C.Cir.), *cert. denied*, 425 U.S. 992 (1976), notwithstanding their obligation to furnish service to the public upon reasonable request. *See* 47 U.S.C. § 201(a).

[27] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). In the First Amendment context, a cable operator's ability or incentive to add an additional channel is no different than a newspaper's ability to add an additional page of newsprint, although the latter is both technologically and economically easier. But even a compulsory access law that imposed no additional costs would "fail[] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258.

[28] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979). *See also Philadelphia T.V. Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966); 47 U.S.C. § 551(c) ("Any cable system shall not be

distinguishing constitutionally between cable's retransmission of a broadcast signal and its provision of cable programming.[29]

Finally, petitioners attempt to dismiss the lower court's holding that the must carry rules impermissibly infringe the First Amendment rights of cable programmers as little more than "a means of justifying the standing of Turner to complain about the must carry rules." (Pet. 8 n.10) (citation omitted). To the contrary, the court's finding that the must carry rules operated to "shut out [cable programmers] . . . from the only forum capable of conveying their programming," (Pet. App. 37a) and to "thwart[] viewer preferences" (Pet. App. 56a) contributed significantly to its conclusion that the rules imposed "substantial First Amendment costs." (Pet. App. 56a).

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subject to regulation as a common carrier . . .") (added by the Cable Communications Policy Act of 1984, Pub. L. 98-549). Likewise, the Commission has long held that cable is not a common carrier. *Second Report and Order in Docket 14895*, 2 FCC 2d 725, 731 (1966).

[29] Petitioners suggest that this Court's opinions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Co. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), validate the argument that a cable operator is simply a "passive conduit" entitled to less than full First Amendment protection. (Pet. 10-11.) While *Fortnightly* and *Teleprompter* did hold that cable's carriage of broadcast signals amounted to passive retransmission, 392 U.S. at 400-01; 415 U.S. 408-09, both decisions were limited to the relatively narrow question of cable's place within the copyright scheme then in effect, an issue not pertinent to the instant case. In fact, because the copyright cases were adjudicated prior to the development of the cable programming industry, it is disingenuous at best to suggest that the opinions in those cases bear in any way on the constitutional claims advanced by cable programmers in this case. Neither of the cable copyright opinions purports to impose a generalized "carrier status" on cable in any context other than copyright. To the contrary, as noted above, both this Court and the FCC have squarely considered the argument that cable is a carrier, and both have explicitly rejected it.

The emergence of the cable programming industry laid bare the fundamental First Amendment infirmity that had always been inherent in the must carry rules: because the rules were designed to protect local broadcasters indiscriminately rather than local, community-oriented broadcast service (Pet. App. 52a-58a), they favored one class of speakers (broadcasters) over all others. As long as there were no speakers other than broadcasters seeking access to cable systems, the constitutionality of the rules remained untested. However, once other speakers—cable programmers—emerged who were restricted by this "grossly overinclusive" (Pet. App. 54a) attempt to protect broadcasters, the lower court was correct in finding that the must carry rules would not withstand First Amendment scrutiny. Ultimately, it is this recognition of cable programmers' rights that places the lower court's opinion in the mainstream of First Amendment jurisprudence and makes plenary review by this Court unnecessary.

II. THE LOWER COURT CORRECTLY APPLIED THE *O'BRIEN* TEST TO THE FACTS OF THIS CASE.

Rather than decide whether the must carry rules were invalid as a direct restraint on speech, the court below tested the rules against the more lenient standard of review reserved for merely incidental restrictions on speech established in *United States v. O'Brien*.[30] Even within this circumscribed inquiry, however, the court correctly determined that the rules missed the mark by a wide margin. There is simply no support for petitioners' contention that the lower court's application of *O'Brien* is so at variance with accepted practice as to justify an exercise of this Court's supervisory powers. (Pet. 18-21).

Under the first prong of the *O'Brien* test, *i.e.*, the existence and substantiality of the governmental inter-

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[30] 391 U.S. 367 (1968).

est, the court of appeals assumed that even if the economic assumptions on which the rules were predicated had not been repudiated by the Commission, the FCC had impermissibly

> failed to "put itself in a position to know" whether the problem the rule seeks to cure—the destruction of free, local television—"is a real or merely a fanciful threat." That approach . . . falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules.

(Pet. App. 49a) (*citing Home Box Office v. FCC*, 567 F.2d 9, 50, (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)). The FCC originally imposed the rules in the 1960s, admittedly on its own intuition, "without waiting for the bodies to pile up." But as Judge Bork observed at oral argument in the court of appeals, the FCC could never point "to a single cadaver" in all this time to justify these heavy-handed regulations.[31]

Under the second prong of the *O'Brien* test, *i.e.*, the fit between the means and the end, the Court similarly found the FCC's rules fell wide outside even the most generous zone of permissible regulatory options. (Pet. App. 53a). The court found the must-carry rules to be grossly overbroad in many respects:

> —they indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator (Pet. App. 54a);

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[31] The court of appeals made clear that it was not holding that the Commission's asserted interest of preserving free, locally-oriented television was not a "substantial interest" (Pet. App. 41a-42a, 51a), but only that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat." (Pet. App. 51a).

—the 18th broadcast station is guaranteed a channel on a cable system even if carriage effectively bumps a cable programmer like CNN previously on the system, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preference (Pet. App. 56a);

—the rules indiscriminately protect every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being (Pet. App. 57a);

—the rules guarantee each broadcaster a second means of reaching its audience, even if the station carries *no local programming* at all. Pet. App. 54a. Under the regulations, a new UHF station broadcasting exclusively rock and roll videos has an absolute right to carriage;

—the rules require a cable system to carry broadcast signals that could *not* be received over the air in the system's community despite the stated intent of the rules "merely" was to ensure that "local" broadcasters could reach their over-the-air audience (Pet. App. 57a n.54).

The court stressed that it was not "quibbling over fine-tuning. . . . For . . . it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives." (Pet. App. 53a) (*citing FEC v. National Conservative Political Action Committee*, —— U.S. ——, 105 S. Ct. 1459, 1470 (1985)).

The petitioning broadcasters distort the court's opinion to make it appear that the FCC was held to some extraordinary standard. To the contrary, the court acknowledged "the breadth of the agency's discretion" (Pet. App. 53a) and expressed a reluctance to "second guess [the FCC's] expert judgment" (Pet. App. 51a), but concluded that deference to the agency was inappropriate in this case:

> As long as [the FCC] continues to rely on wholly speculative and unsubstantiated assumptions, . . . our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done.

(Pet. App. 52a).

Thus, the court of appeals did not ride roughshod over agency discretion; it was particularly sensitive, as this Court has instructed it must be, to the necessity of the government advancing more than an unsubstantiated government interest where constitutional rights are involved. *See, e.g., City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2128 n.22 (1984); *Federal Election Commission v. National Conservative Political Action Committee, supra*, 105 S.Ct. at 1471 ("when the First Amendment is involved, [the] standard for review is 'rigorous' . . . .") (citation omitted); Pet. App. 43a n.44.[32]

Conceptually, must-carry regulation that struck a balance between localism and free television service on the one hand, and duplication, diversity and the rights of

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[32] Furthermore, unlike *Clark v. Community for Creative Non-Violence*, where the Court explained that the Park Service "regulation 'responds precisely to the substantive problems which legitimately concern the [Government],'" 104 S. Ct. 3065, 3071 (1984) (*citing City Council v. Taxpayers for Vincent*) the rules in this case fall well beyond the wide range of constitutionally permissible regulatory options. Pet. App. 52a-53a. Nor is this a case in which the lower court invalidated an otherwise valid content-neutral regulation on the basis of exceptional circumstances. Rather, the lower court correctly "evaluated [the must carry rules] in terms of their general effect," *United States v. Albertini*, —— U.S. ——, 105 S.Ct. 2897, 2907 (1985), but even under this lenient standard of review, the rules' restrictions on the time, place and manner of expression failed to pass constitutional muster.

cable programmers, operators, and viewers on the other, would present a different case than these rules. Under the circumstances of this case, where the court found it "difficult to imagine a less discriminating or more over-inclusive means of furthering the Commission's stated objectives," [33] the court of appeals correctly interpreted and applied this Court's consistent standards for judging the necessary fit between the means and ends.

III. THE LOWER COURT'S DECISION IS A NARROW ONE, INVALIDATING THE RULES ONLY IN THEIR CURRENT FORM.

Petitioners predict that the lower court's decision will upend the regulatory scheme governing the provision of cable service by inviting challenges to the recently-enacted federal cable statute [34] and by throwing the legitimacy of the local franchising process into chaos. For these reasons, petitioners argue, the lower court opinion cannot be allowed to stand. (Pet. 15-18).

Contrary to petitioners' unsupported assertions and fears, however, the lower court opinion focused exclusively on the constitutionality of the must carry rules then in effect and found those rules to be fundamentally flawed. Thus, the panel "stress[ed] that we have not found it necessary to decide whether any version of the rules would contravene the First Amendment. We hold only that in their current form they can no longer stand." (Pet. App. 60a).

Nonetheless, petitioners argue that the court's opinion is "an important precedent" that will "accelerate the instances in which state, local, and sometimes federal franchise provisions are challenged as unconstitutional." (Pet. 16). The mere fact that a case is "important,"

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[33] Pet. App. 53a.

[34] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*

however, does not justify plenary review unless it involves "a question of federal law which has not been, but should be, settled by this Court." [35] As discussed above, the lower court's opinion, while indisputably important, relies on well-established precedents of this Court.

Moreover, the lower court opinion is but one of a number of recent decisions that demonstrates a widespread recognition that the First Amendment significantly restricts government regulation of the electronic media.[36] These decisions, and the determination of the cable industry to secure its First Amendment rights, would probably have spurred challenges to the regulation of cable operators and programmers, even in the absence of the lower court opinion in the instant case.[37] Petitioners' speculation that that opinion may incre-

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[35] Supreme Court Rule 17.1(c).

[36] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985) (First Amendment bars auction process that results in the award of a single cable franchise); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) and *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (indecency statute applied to cable violates First Amendment); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1337 (D.C. Cir. 1985) (cable's "activities of transmitting and packaging programming mandate that it receive First Amendment protection").

[37] Petitioners do not claim that the court of appeals decision directly impacts the cable franchising process, but only state that the opinion below "invites litigation" challenging provisions of the recently-enacted Cable Communications Policy Act of 1984) (47 U.S.C. §§ 531, 532) that authorize franchising authorities to establish access channels for public, educational, and governmental use, and requiring that additional channels be set aside for commercial access. However, the court explicitly distinguished cable access rules from the must carry regulations, noting that the former "serve countervailing First Amendment values by providing a forum for public or governmental authorities . . . ." (Pet. App. 38a-39a).

mentally accelerate the number and frequency of those challenges is no basis for review.

IV. THE LOWER COURT DID NOT ERR IN VACATING THE MUST CARRY RULES, PARTICULARLY WHERE IT HAS AFFORDED THE FCC AN OPPORTUNITY TO RECRAFT THE RULES IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT.

Finally, petitioners fault the court of appeals for failing to leave unconstitutional regulations in effect until the agency itself could revisit those rules. (Pet. 21-23). Petitioners claim that the court of appeals conducted its own rulemaking, found facts, and made final policy judgments. That is patent nonsense. The court determined on the basis of the record before it that the must carry rules, based on nothing more than intuition and instinct (Pet. App. 47a-52a), were a "fatally overbroad" intrusion on the First Amendment rights of cable programmers, operators and viewers (Pet. App. 53a) (citation omitted). Under those circumstances, the court properly voided the rules rather than remand the case to the Commission for additional proceedings while the rules remained in effect. The latter course would have worked irreparable injury on cable programmers, operators, and viewers by perpetuating the abridgment of their First Amendment rights.[38]

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[38] *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983) (no need to prove "chill" on exercise of First Amendment rights in order to show irreparable injury); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (where constitutional right threatened or impaired, irreparable injury found); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

Nor is a remand to the agency required in this case, as petitioners imply. As this Court has recognized, "[u]nder 28 U.S.C. § 2106 [the Supreme Court or any other court of appellate jurisdiction]

Petitioners also allege that the lower court's opinion is rife with factual and judgmental errors that could have been avoided had the court remanded this case to the expert agency for further proceedings.[39] (Pet. 21-24). Petitioners argue that this evidence of purported judicial overreaching by the court of appeals "warrant[s] examination by this Court." (Pet. 21). Petitioners' argument ignores the court's explicit invitation to the Commission to "recraft the [must carry] rules in a manner more sensitive to . . . First Amendment concerns." (Pet. App. 60a). Should petitioners desire a "full-fledged agency rulemaking" in which the expert

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ha[s] power to dispose of [a] case 'as may be just under the circumstances' ". *Grosso v. U.S.*, 390 U.S. 62, 71 (1968). Thus, the court of appeals did not err in refusing to remand this protracted litigation to the FCC. It is well settled that "[e]ffective judicial administration" in many instances requires that an appellate court dispose of a matter, rather than remand for further consideration. *E.g., Levin v. Mississippi River Fuel Corporation*, 386 U.S. 162, 170 (1967). This is particularly the case where, as here, the outcome of any further consideration by the agency can go in only one direction. *E.g., Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (Supreme Court found it need not remand case to state court where Supreme Court balances First Amendment interests at stake and finds that state court erred in constitutional analysis).

[39] Among the lower's courts alleged errors is the inability to "appreciate the interrelationship between FCC regulatory and copyright issues." (Pet. 24). As the court of appeals correctly recognized, however, nothing in its decision conflicts with the current copyright scheme. (Pet. App. 41a-42a n.42).

Petitioners suggest that enactment of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, somehow mandates that must carry and compulsory licensing of secondary transmissions must live or die together. (Pet. 24 n.24). However, the Senate Committee Report cited by petitioners in an attempt to support this point is not part of the official legislative history of the Cable Act. *See* 130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984) (remarks of Sen. Packwood), H12235 (daily ed. Oct. 11, 1984) (remarks of Rep. Wirth). The Cable Act itself addresses neither the must carry rules nor the copyright law.

agency can "find[] facts, assess[] industry trends, and resolv[e] various judgmental issues" in an effort to formulate must carry rules that can pass constitutional muster (Pet. 21), the Commission is free to conduct such a proceeding. Review by this Court is unnecessary in order to provide that opportunity.

Perhaps no stronger evidence of that conclusion exists than the FCC's recently-expressed willingness to reopen the must carry matter. As the Chairman of the Commission has made clear,

> [W]e never intended our statement [announcing a decision not to appeal the lower court's opinion] to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules.[40]

Indeed, the Commission has received three such proposals submitted on behalf of a number of the petitioners, requesting the FCC to "issue a notice of proposed rule making contemplating adoption of new, tailored rules to replace its recently vacated 'must carry' rules." [41] Hence, even petitioners recognize that the court of appeals has not superseded or foreclosed the Commission from reconsidering the must carry issue, if the FCC decides that to do so is in the public interest.

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[40] Letter from Hon. Mark Fowler to Senator Barry Goldwater, September 24, 1985.

[41] *In the Matter of Adoption of New Local Carriage Rules for Cable Television Systems, Joint Petition for Rule Making* (filed Oct. 4, 1985, on behalf of National Association of Broadcasters; Assn. of Maximum Service Telecasters; Station Representatives Association; American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.; ABC Affiliates Association; Spanish International Communications Corp. *et al.*; and National Religious Broadcasters), at i. *See also In the Matter of Cable Television Carriage of Television Broadcast Signals, Petition for*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 25, 1985

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Rulemaking (filed Oct. 4, 1985, on behalf of Association of Independent Television Stations, Inc.) (requesting the Commission "to institute rulemaking proceedings for the regulation of cable television carriage of television broadcast signals"); *Joint Petition for Rulemaking of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service* (filed Oct. 15, 1985).